

This is a claim for an August 25, 2000 accident and resulting injuries to the back. In the March 14, 2003 Award, Judge Barnes awarded claimant a 19 percent permanent partial general disability, which was based upon the functional impairment rating provided by Dr. Paul S. Stein. The Judge rejected respondent and its insurance carrier's request to reduce claimant's permanent disability benefits by a six percent whole body functional impairment rating previously provided by Dr. Duane A. Murphy. In rejecting respondent and its insurance carrier's request, the Judge reasoned that the record did not establish

that Dr. Murphy utilized the fourth edition of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) in assessing claimant's functional impairment.

Respondent and its insurance carrier contend Judge Barnes erred. They argue the Workers Compensation Act does not require that a worker's preexisting functional impairment be measured by the fourth edition of the AMA Guides. Accordingly, respondent and its insurance carrier contend that claimant's permanent partial general disability award should be reduced to 13 percent.

Conversely, claimant contends the March 14, 2003 Award should be affirmed. Claimant argues this Board, which was later affirmed by the Kansas Court of Appeals, has previously held that a preexisting functional impairment rating must be measured using the appropriate edition of the AMA Guides before that rating can be used to reduce an injured worker's permanent disability award.

The only issue before the Board on this appeal is whether respondent and its insurance carrier proved the amount of claimant's preexisting functional impairment for purposes of reducing claimant's permanent disability award as provided by K.S.A. 44-501(c).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and the parties' arguments, the Board finds and concludes:

The facts are not in dispute. On August 25, 2000, claimant injured his back while working for respondent. As a result of that injury, claimant underwent two back surgeries. Claimant recovered from those surgeries and is now back to work for respondent, earning more than he was earning at the time of the accident.

One of claimant's treating physicians, Dr. Paul S. Stein, using the fourth edition of the AMA Guides, determined that claimant now has a 19 percent whole body functional impairment.

But this is not the first back injury that claimant has sustained. In 1998, claimant injured his back while working for respondent. At that time, claimant treated with Dr. Duane A. Murphy, who prescribed therapy and injections. Dr. Murphy did not testify in this claim. But the parties stipulated to the doctor's records, which include Dr. Murphy's September 27, 2000 letter to Dr. Thomas M. Tran. In that letter, Dr. Murphy wrote that claimant had a six percent whole body functional impairment in 1998. Dr. Murphy's letter reads, in part:

I had the pleasure of seeing Mr. Chevalier in consultation regarding his back. I had seen him previously in 1998 in regards to a lumbar disk which was treated with epidural corticosteroid injections with good improvement in his pain. His impairment of function to the body as a whole at that point in time was 6%. He stated prior to his most recent injury he was not having any difficulty with his back. He fell at work striking the pre-tibial region. After his injury he noted lower back, buttocks, and left leg pain. The pain radiates to his foot into his left great toe. His pain is increased with activities.

But Dr. Murphy's letter does not indicate what guide, if any, the doctor used in assessing claimant's functional impairment. And a review of Dr. Murphy's medical records does not indicate how the doctor arrived at the six percent rating. According to claimant, the doctor rated him in 1998 and in 1999 claimant settled his workers compensation claim for the 1998 accident.

Claimant took Dr. Stein's deposition for purposes of this claim. The doctor was not asked to review claimant's medical history and provide an opinion regarding the amount of claimant's functional impairment immediately before the August 25, 2000 accident.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of **functional impairment** determined to be preexisting.<sup>1</sup> (Emphasis added.)

And functional impairment is defined by K.S.A. 44-510e, as follows:

**Functional impairment means** the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established **by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment**, if the impairment is contained therein. (Emphasis added.)

Consequently, by definition the Act requires that preexisting functional impairment be established by competent medical evidence and ratable under the appropriate edition of the *AMA Guides*, if the condition is addressed by those *Guides*.<sup>2</sup>

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<sup>1</sup> K.S.A. 44-501(c).

<sup>2</sup> See *Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals June 1, 2001).

The Act neither requires that the functional impairment be actually rated before the subsequent work-related accident nor that the worker had been given work restrictions for the preexisting condition. Instead, the Act only requires that the preexisting condition must have actually constituted a ratable functional impairment.

Furthermore, the Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) reduction. In *Mattucci*,<sup>3</sup> the Kansas Court of Appeals stated:

Hobby Lobby erroneously relies on *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both *Baxter* and *Hampton* instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton [sic]* court declared that "settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury." 241 Kan. at 593.

Respondent and its insurance carrier have failed to prove the amount of functional impairment that existed before claimant's August 25, 2000 accident.

The burden of proving a workers compensation claimant's amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.<sup>4</sup>

Consequently, the Award should not be reduced for a preexisting functional impairment under the provisions of K.S.A. 44-501(c). Accordingly, the March 14, 2003 Award should be affirmed.

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<sup>3</sup> *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals June 9, 2000).

<sup>4</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), rev. denied 270 Kan. \_\_\_\_ (2001).

**AWARD**

**WHEREFORE**, the Board affirms the March 14, 2003 Award entered by Judge Barnes.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant  
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director